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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 278

WILLIAM PRESSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 31-35) is not yet reported. The opinion of the district court overruling a motion for judgment of acquittal or a new trial appears at page 326 of the petitioner's appendix.

JURISDICTION

The judgment of the court of appeals (Pet. 35) was entered on July 6, 1961. The petition for a writ of certiorari was filed on August 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a trial on a charge of obstruction of justice by mutilating and concealing records sought by a congressional investigating committee, it sufficiently appeared that the records were sought for a legitimate purpose, and, if so, whether the failure of petitioner successfully to frustrate the inquiry bars the prosecution.

2. Whether admission of the testimony of the chairman of the committee as to the subjects under inquiry and the information sought was reversible error.

3. Whether the subpoena for the records was validly issued, and, if not, whether the charge of obstruction of justice can nevertheless be maintained.

4. Whether the summation of the prosecutor was fair.

5. Whether the evidence was sufficient to support the conviction.

STATUTE INVOLVED

18 U.S.C. 1505 provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or
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> * * * * *
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication

influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Ohio on a one-count indictment charging that he obstructed and endeavored to obstruct the due and proper exercise of the power of inquiry under which the Senate Select Committee on Improper Activities in the Labor or Management Field was conducting an investigation of the extent of criminal or other improper activities in those areas. It was alleged that between September 9 and September 13, 1958, petitioner had mutilated a certain invoice, and that he concealed and withheld from the committee an envelope bearing the notation "Christmas List" and a memorandum containing a list of names with various items of merchandise or amounts of money written next to them, all from the files of Joint Council No. 41 of the International Brotherhood of Teamsters, of which petitioner was president, when he knew that the committee was interested in these items and had subpenaed them by personal service on him (P.A.

5–7).[1] Petitioner was found guilty by a jury and was sentenced to eight months imprisonment (P.A. 330).

The evidence supporting the conviction may be summarized as follows:

On January 30, 1957, the Senate established a committee to conduct an investigation into the extent of criminal and other improper activities in the field of labor and management (P.A. 19–20, 309–313).[2] After its organization, the committee and its staff made an investigational study which covered the misuse and misappropriation of union funds improperly to influence public officials and to enrich union officials (P.A. 20–21). Among the subjects of inquiry were the affairs of certain officials and other persons connected with the Teamsters Union (P.A. 29, 44).

On March 21, 1958, and on April 1, 1958, committee subpenas, signed by Senator McClellan, directed to Joint Council 41, International Brotherhood of Teamsters, were served (P.A. 57–58, 88–89, 103–104).[3] An

[1] The record on file with the Clerk consists of the appendices to the briefs filed in the court of appeals. Petitioner's appendices will be designated as "P.A." and the government's as "G.A."

[2] Senate Resolution 74, 85th Cong., 1st Sess. (Exhibit 5–C; P.A. 312–313). The life of this committee was continued by resolution to January 31, 1959. Senate Resolution 221, 85th Cong., 2d Sess. (Exhibit 5–A; P.A. 309–310).

[3] The March subpena, exhibit 9, called upon the Joint Council to produce its "records for the period January 1, 1949 to January 1, 1958, including cash receipts and disbursement books, ledgers, cancelled checks, check stubs, day books, paid bills, record of loans, correspondence files, memoranda, payroll records, minutes of meetings, records of all bank accounts open or closed, and any other record relating to Joint Council No. 41, Inter-

arrangement was entered into between the committee and the union whereby records subpenaed would be turned over to a committee office in Cleveland (P.A. 58–59).

On March 24, 1958, the committee filed an interim report recommending legislation (P.A. 25–27; G.A. 75–90).[4] In August 1958, the committee became interested in the relationship between the Teamsters Union and former Senator George Bender, the head of a so-called antiracketeering commission which had been established by the union to investigate corruption and improper practices of its own officials (P.A. 29–34, 45). A committee investigator, Walter Sheridan, was dispatched to Ohio to look into the books and records of certain organizations in this regard (P.A. 34, 60–62).

On September 9, 1958, at the offices of Joint Council 41, after Sheridan asked for its correspondence files which the committee had subpoenaed and not received, petitioner permitted him to go through these files which were located in a file cabinet in his secretary's

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national Brotherhood of Teamsters". (P.A. 104). Its date of issuance was listed as March 19, 1957, instead of March 19, 1958, because of a typographical error (P.A. 102, 105). The April subpena called for the production of all records from January 1, 1949 to date. It specified the same types of records as the March subpena. In lieu of the language "relating to Joint Council No. 41," it substituted "relating to Joint Council No. 41 Welfare Records, Building Association Records, Special Fund Records and the Teamsters Year Book" (P.A. 318, 89, 103).

[4] S. Rep. No. 1417, 85th Cong., 2d Sess. (1958). This report, Exhibit 7, was not permitted to go into the jury room and was not examined by the jury (P.A. 212–213).

office. Sheridan found an envelope marked "Xmas List", containing a Deutsch Company invoice showing the purchase by the Council of eight champagne masters [buckets] at $100 each, for eight individuals whose last names were listed, including the name Bender; Sheridan made notes (Exhibit 10) of the invoice (P.A. 63–64, 66, 68–69, 156–157, 315).[5] He told petitioner that he would like to take four files with him, but consented to leave them in petitioner's possession for photostating (P.A. 63, 171).

About September 11, 1958, petitioner, who had purchased the champagne buckets in 1955, contacted the salesman who had made the sale and asked if he had any records of this transaction. After telephoning the company, the salesman told petitioner that there were no such records available (P.A. 208–209, 121).[6]

On September 13, 1958, when Sheridan returned for the files, petitioner obtained them from his own office and gave them to him, saying that he had not touched them. Sheridan, noting that the invoice had been torn, and that the envelope and the other piece of paper containing the names were missing, told petitioner that he should not have trusted him. Petitioner replied, "You have your job to do, I have mine" (P.A. 71–73, 96–97). The invoice also con-

[5] The other names were Beck, English, Hoffa, Brennan, Connell, Bliss, and Dorfman (P.A. 317).

[6] On September 13, 1958, after leaving petitioner's office, Mr. Sheridan visited the seller of the buckets. The salesman had telephoned the company one or two days prior to this visit (P.A. 75, 100, 121, 209).

tains alterations which had been made by an erasure (P.A. 133).

At the trial, petitioner acknowledged knowing that the committee investigation could affect the Teamsters, that the committee had made reports to the Senate concerning the Teamsters, that it made some special findings with respect to the Teamsters, and that he knew of and was interested in the "clean-up commission" headed by former Senator Bender. He also said he was interested in the findings of the committee (P.A. 254–255, 262–264). His defense consisted of a denial that he had mutilated the invoice (P.A. 232). He stated that he had gone to Washington between Sheridan's two visits, leaving on September 9 and returning on the 12th, and that, while in Washington, he had seen James R. Hoffa (P.A. 229, 237–244).

On rebuttal, the government introduced telephone records which reflected that, on September 11, 1958, two long distance person-to-person phone calls had been made by James R. Hoffa, in Washington, D.C., to petitioner in Cleveland (P.A. 286–287).

The prosecution requested the judge to tell the jury that the relevancy of the information sought by the committee had been established as a matter of law (G.A. 35), but the judge deemed it a fact issue and instructed the jury accordingly (P.A. 294, 304, 326–327). When counsel for petitioner was asked for exceptions to the court's charge, he announced he had "nothing" (P.A. 307).

ARGUMENT

1. There is no validity to petitioner's contention that the mutilation of the invoice and the concealment of the memorandum with the list of eight names were not pertinent to any "question under inquiry" by the Senate Committee. While the statute (18 U.S.C. 1505, *supra*, pp. 2–3) does not specifically make pertinency an element of the offense,[7] the government agrees that the attempted obstruction "must bear a reasonable relationship to the subject of [the] inquiry" (*United States* v. *Siegel*, 152 F. Supp. 370, at 374 (S.D.N.Y.), affirmed, 263 F. 2d 530 (C.A. 2), certiorari denied, 359 U.S. 1012), and urges that that condition has been fulfilled.

(*a*) The issue of "pertinency" can, as petitioner recognizes, be at least twofold: (1) the general question of the committee's powers to inquire into a certain subject matter; and (2) the specific question whether the particular information sought is relevant to that subject matter. Both aspects of pertinency were amply met in this case. Petitioner does not and cannot deny that the committee was pursuing its proper function in examining into the general field of improper activities in labor-management relations (P.A. 212–213). As an integral part of that investigation, the committee was duly conducting an inquiry into the misuse of union funds improperly to influence

[7] The issue of pertinency in a contempt-of-Congress prosecution (2 U.S.C. 192), and the issue of materiality in a perjury case (18 U.S.C. 1621) and in a false statement case (18 U.S.C. 1001), are made an element of the respective offenses by statute.

public officials and to enrich union officials. See the Statement, *supra*, p. 4. Evidence of payments or gifts to such persons would obviously be relevant to that inquiry. Here, the Deutsch invoice and accompanying paper showed a gift to a United States Senator, to union officials, and to others. Clearly, the use of union funds, amassed from contributions of the members, to buy expensive Christmas gifts for public officials and labor leaders was a matter of legitimate interest to this committee. Congress has been legislating in the field of labor legislation for years and has evinced increasing concern that union dues not be misused. See the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519.

(*b*) Petitioner's contention that the statute was not violated because the information was ultimately obtained by the committee from other sources is likewise incorrect. The statute uses the word "endeavor" (*supra*, pp. 2–3) to describe *any* effort, successful or not, to accomplish the proscribed purpose. *United States* v. *Russell*, 255 U.S. 138, 143. Congress did not restrict its ban to successful obstructions. In this case, moreover, the attempt was successful to the extent that the actual records were destroyed.

2. At the trial, Senator McClellan, the committee chairman, testified to the authority of the committee and the machinery of its operation as reflected in its resolution and rules (P.A. 18–25); the general background of its investigations leading up to the matters laid in the indictment (P.A. 25–28); the specific subjects of interest to the committee with reference to petitioner and his union (P.A. 28–34); the activi-

ties of investigator Sheridan with respect to those subjects and to the machinery of the committee's operations (P.A. 34); the manner in which the committee had been obstructed by the acts of petitioner (P.A. 41–46); and the fact that legislative recommendations had sprung from the committee's work (P.A. 47).[5] Petitioner's various objections to this testimony are all without merit.

(*a*) In this Court, as in the court of appeals, petitioner argues that, since the issue of pertinency was for the court, the portion of the testimony bearing on pertinency should not have been before the jury. But at the trial petitioner did not urge that pertinency was for the court. Although the government submitted an instruction asking that the jury be told that pertinency had been proved as a matter of law, petitioner offered no request on that issue, took no exception to the charge on the issue, and did not claim that the court should take this issue from the jury (G.A. 36–37; P.A. 307). Petitioner cannot pursue one course at the trial and when it has proved unprofitable shift his position on appeal. *Johnson* v. *United States*, 318 U.S. 189, 201.

It is true that the trial court normally rules on the issue of pertinency as a matter of law. But there are occasions when the question has been put to the jury, and the submission of the issue in the present case cannot be regarded as error. Where, after an initial determination by the trial judge that the mat-

[5] As noted *supra*, fn. 4, the committee's interim report was not permitted to go into the jury room.

ter is pertinent, there is left a question of fact bearing on the basis for this determination, it has been held proper to present this mixed question of fact and law to the jury. *United States* v. *Orman*, 207 F. 2d 148, 156 (C.A. 3) (a contempt prosecution). The trial court may have considered that to be the situation here. In any event, submission of the issue to the jury usually favors the defendant, and, accordingly, the appellate courts have refused to reverse where timely objection to this mode of proceeding was not made. *United States* v. *Moran*, 194 F. 2d 623 (C.A. 2), certiorari denied, 343 U.S. 965.*

Petitioner's claim, in this connection, that the trial court failed itself to rule on pertinency is without substance. The court implicitly ruled on the matter in denying the motion for judgment of acquittal. *United States* v. *Moran*, *supra*, at 626.

(*b*) Petitioner also complains of the testimony that failure to obtain the names of the recipients of the gifts shown on the invoice would hamper the committee (P.A. 45–46)—contending that this was a question of law not subject to evidence. Petitioner was not prejudiced by this testimony because the Senator was correct in his conclusion. As we have pointed out, *supra*, pp. 8–9, this information was clearly pertinent to the inquiry. In any event, petitioner did not object to the question on this ground. His only objection below was a general one (P.A. 45–46).

* Petitioner's reliance in *Keeney* v. *United States*, 218 F. 2d 843 (C.A.D.C.), is misplaced. Both sides there recognized that the issue of pertinency was for the court and defense counsel specifically requested that the court hear testimony on this issue outside of the presence of the jury.

(*c*) In the same vein, petitioner contends that proof of the scope of the committee's inquiry was limited to the Congressional resolution, and that Senator McClellan's testimony on this issue was inadmissible (Pet. 10–12). The Senator testified that, pursuant to the authorizing resolutions, his committee investigated the misuse and misappropriation of union funds improperly to influence public officials and to enrich union officials (P.A. 20–21). Such evidence by committee members or counsel is admissible to show the scope of the investigation. *United States v. Moran*, 194 F. 2d 623, 626 (C.A. 2), certiorari denied, 343 U.S. 965.

(*d*) Petitioner also objects to the testimony identifying the persons to whom the champagne buckets had been given, and the use of the committee's interim report in this connection (P.A. 41–45). He claims he was prejudiced by the report's characterization of the recipients of the gifts. The evidence shows that six of the eight named recipients were identified. Of those identified, three were described as Teamster officials and one as a former United States Senator (P.A. 43). Only Dorfman was characterized as a person of bad repute.[10] The court sustained an objec-

[10] Dorfman was identified as the operator, directly or indirectly, of an insurance concern that had considerable business with the Teamsters (P.A. 43). The following was also read from the Interim Report: "Of Paul (Red) Dorfman, who reached ascendancy in the Chicago labor movement after the murder of his predecessor and who has maintained a continuous association with Chicago mobsters" (P.A. 44). In his testimony, petitioner denied knowing this information (P.A. 256).

tion to a question as to whether former Teamsters President Dave Beck had been prosecuted for law violations (P.A. 41–42).[11] This line of testimony was not offered to attack petitioner's character but because it was relevant to the questions of pertinency and of petitioner's motive to destroy the papers. See *United States* v. *Weber*, 197 F. 2d 237 (C.A. 2), certiorari denied, 344 U.S. 834; *infra*, pp. 16–17.

(*c*) Finally, petitioner complains of the reading into evidence of a transcript of Walter Sheridan's testimony before the committee concerning his visits to petitioner on September 9 and September 13, 1958—on the ground that it bolstered Sheridan's testimony at the trial. (Pet. 17–18). The record shows, however, that this evidence was not introduced to corroborate Sheridan's subsequent trial testimony, and that it did not prejudice petitioner.

In the first place, this transcript (which did not go to the jury) was plainly introduced on the issue of pertinency to show that the information sought from petitioner bore a reasonable relationship to the matter under investigation (P.A. 35–36). Second, petitioner did not dispute the facts reported by Sheridan to the committee; his main defense was that during the four days between Sheridan's visits he was not in exclusive control of the documents and that he had been out of town during the major portion of that time.[12] The

[11] Petitioner himself admitted on cross-examination that he knew the committee had made reports which contained references to the Teamsters and specifically to Dave Beck, one of the persons named on the invoice (P.A. 253–257).

[12] This defense was made clear from the outset by counsel's opening statement (G.A. 8–11).

contradiction was not between petitioner and Sheridan, but between petitioner (who testified he was visiting James R. Hoffa in Washington between the Sheridan visits) and a telephone company records, placed in evidence in rebuttal, which disclosed two person-to-person calls from Hoffa in Washington to petitioner in Cleveland during this period of time.[13] Third, petitioner did not object to the introduction into evidence of the notes that Sheridan made of the invoice and of the paper memorandum on his first visit (P.A. 69). These notes were the chief corroboration of his trial testimony, not his prior recital to the committee.

3. Sheridan, a committee investigator, testified that the subpena of March 19, 1958, had in all likelihood been signed in blank by Senator McClellan, the committee chairman, and had been filled in by the committee investigators (P.A. 83–84, 89). Petitioner erroneously contends that any subpena so issued is invalid, and that, therefore, he could not have obstructed justice by destroying records demanded by the subpena (Pet. 18–22).

An obstruction-of-justice prosecution does not require that the documents mutilated or concealed be under subpena. In cases involving tampering with witnesses, it has uniformly been held that an offense may be committed even though the acts of the defend-

[13] *Mellon* v. *United States*, 170 F. 2d 583 (C.A. 5), relied on by petitioner, involved a direct contradiction between the defendant and the chief government witness, so that the corroboration was crucial. Cf. *Harrod* v. *United States*, 29 F. 2d 454 (C.A. D.C.).

ant occur prior to the issuance of a subpena, or, in the case of a voluntary witness, even though no subpena is ever issued. *Broadbent* v. *United States*, 149 F. 2d 580, 582 (C.A. 10); *Odom* v. *United States*, 116 F. 2d 996, 998–999 (C.A. 5), reversed on other grounds, 313 U.S. 544; *United States* v. *Solow*, 138 F. Supp. 812, 814–815 (S.D.N.Y.). In the instant case, the documents were mutilated after Sheridan's first visit on September 9, 1958 (six months after the subpena had been served on petitioner), at which time Sheridan permitted their retention for the purpose of photostating. Petitioner's knowledge that the documents were wanted by the committee, and that his continued custody was temporary, was clearly established. That would be enough for an obstruction-of-justice prosecution, even if no subpena had been issued. Moreover, insofar as the mutilation resulted in denying the committee an opportunity to consider an objection to the subpena, this was in itself an obstruction of the committee's processes. See *United States* v. *Bryan*, 339 U.S. 323, 332.

The practice of having committee investigators fill in subpenas signed in blank by the committee chairman is not different from the practice of having judicial subpenas signed in blank which prevails in federal courts. See Rule 17(a), F.R. Crim. P.[14] In

[14] *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, is concerned with the delegation by administrative officers of the entire function of the subpena power to lower echelon officials where there is no express authority. There was no such delegation in the instant case: the subpena was signed by Senator McClellan.

any case, the six months' acceptance of the subpena, without protest by either the union or the committee, indicates acquiescence by the former and ratification by the latter.

4. Petitioner, who made no objection to the closing argument, now complains that it was unfair (Pet. 26–28). First, he claims that the mention of some of the specific names on the mutilated invoice constituted a reference to "criminals", "racketeers", "unsavory characters" and "persons of bad reputation" (P.A. 343–344, 347–348). Examination of the argument shows that the prosecuting attorney went out of his way to caution the jury about such matters (P.A. 343–344):

> Now, the purpose for bringing out whether or not Beck, Hoffa, Brennan, or Dorfman, or anyone else, has a bad reputation is not so that it will reflect in any way on the defendant, and it shouldn't, because anyone who had been in the labor movement or any other movement where there would be people who might have a bad reputation, you couldn't help of necessity but have some contact with them. That was not our purpose in bringing it out, and we don't want it considered against the defendant in that way. The purpose for our bringing it out, you will recall Mr. Presser testified from the minutes of the Joint Council meeting of August 14, 1958 * * * he was afraid that he might be fired from his job by the monitors, and that the cause of the firing could be an association with people of bad reputation. Now, we wanted to show that some of the people in this organization did have a

> bad reputation, or at least what might be considered a bad reputation, and that this would be another motive for Mr. Presser destroying the document or concealing his association with them from the public.'

Thus, the summation made it crystal clear that the testimony with respect to people of bad reputation was to be considered only in regard to the question of petitioner's motive, based on his own testimony, and for no other reason. Moreover, petitioner did not request the court to limit this testimony in any manner (G.A. 35–37).

Petitioner also claims that the prosecuting attorney misstated the testimony of the champagne bucket salesman, Charles Schaeffer. The record shows that Schaeffer testified that petitioner called him in September 1958 and asked him whether he, Schaeffer, had any records of anything that had been sold to him or the Teamsters Union in the form of gifts and that particular reference was made to champagne buckets. Schaeffer then called the selling company, and in turn asked for duplicate copies of any invoices pertaining to such sales. He was not able to obtain these copies from the company and so informed petitioner (P.A. 209). The prosecutor's argument that petitioner asked the salesman to obtain other copies pertaining to this gift was a fair interpretation of this testimony (P.A. 341-342; G.A. 33). Significantly, petitioner made no objection to this argument nor did he mention it when he refered to the salesman in his closing statement (G.A. 26). As petitioner points out here

(Pet. 28), the trial judge reached the same conclusion (P.A. 328).

5. The trial narrowed to the question whether petitioner mutilated the invoice and concealed the other paper. Sheridan gave direct testimony that, in examining certain files in petitioner's office on September 9, 1958, he noted the invoice with its list of eight names, and that when he returned on September 13, 1958, the invoice had been mutilated so as to remove the names. All persons who had an opportunity to do this deed replied that they had not (P.A. 173–174, 192, 194). Petitioner's specific interest in this particular invoice is indicated by his call to the salesman (Schaeffer), as well as by the evidence of his motives for destroying the document. Finally, the jury was impressed, as were both courts below, by the documented contradiction of petitioner's testimony that he was absent from Cleveland between September 9 and 13. The jury was properly allowed to resolve the issue of guilt on ample direct and circumstantial evidence.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1961.